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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

HULEN T. HARRELL,

Plaintiff and Appellant,

v.

ALAMEDA COUNTY SHERIFF'S
DEPARTMENT et al.,

Defendants and Respondents.

A144472

(Alameda County
Super. Ct. No. RG13665188)

Plaintiff Hulen T. Harrell, appearing in propria persona, has filed an appeal from orders denying his motion to vacate an order sustaining a demurrer to his complaint¹ and denying his motion to disqualify opposing counsel. Defendants have filed a motion to dismiss the appeal on the ground that the order denying plaintiff's motion to vacate is not an appealable order. We agree that the order denying plaintiff's motion to vacate is not an appealable order and, therefore, shall dismiss the appeal with respect to that order.²

¹ Plaintiff's motion is captioned in full: "Motion to vacate/set aside improvidently rendered order affirming tentative ruling dated 11-17-14 per C.C.P. sec. 473(b) (mistake, inadvertence, surprise, or excusable neglect) for failure to determine Heck doctrine successful judgment issue, and consider 'highly probative' factual matters contained in exhibits G-7, and exhibit G-8."

² Although defendants do not reference in their motion the order denying plaintiff's motion to disqualify opposing counsel, plaintiff's notice of appeal, fairly interpreted, encompasses an appeal from that order as well. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20 [A notice of appeal " " "shall be liberally construed in favor of its sufficiency." " " "].) Insofar as an order on a motion to disqualify is immediately appealable as an injunctive order (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882), the appeal will proceed with regard to that order.

Factual and Procedural Background

On June 13, 2013, plaintiff filed a first amended complaint against defendants seeking damages for intentional tort and loss of intellectual property. On November 17, 2014, the trial court sustained defendants' demurrer to the first amended complaint. Plaintiff was granted leave to amend on a number of claims and, as the court noted, defendants' demurrer did not challenge all of plaintiff's claims. As relevant to the present motion, the court sustained without leave to amend plaintiff's claims for damages for his allegedly unconstitutional conviction and imprisonment. Citing *Heck v. Humphrey* (1994) 512 U.S. 477, 486-487, the court explained that no such claim is permissible "unless the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus."

On December 30, 2014, plaintiff filed a motion to vacate the November 17 order. Plaintiff sought reconsideration of the November order on the ground that *Heck v. Humphrey*, *supra*, 512 U.S. 477, is not applicable if a plaintiff is no longer in custody and he has evidence, which he failed to present previously due to inadvertence or neglect, that he is no longer in custody on his prior criminal convictions. Following a hearing on January 30, 2015, the trial court denied plaintiff's motion to vacate. The court explained that Code of Civil Procedure³ section 473, subdivision (b) is not applicable to plaintiff's motion and that it is properly considered a motion for reconsideration under section 1008. The court found that plaintiff had not satisfied the procedural requirements for reconsideration under section 1008 and that, in any event, his arguments lacked substantive merit.

Plaintiff timely filed a notice of appeal.⁴

³ All statutory references are to the Code of Civil Procedure unless otherwise noted.

⁴ While this appeal has been pending, plaintiff filed a second amended complaint. Defendants' request that we take judicial notice of plaintiff's second amended complaint is granted.

Discussion

The right to appeal is purely statutory, and absent an appealable judgment or order, the appellate court has no jurisdiction to consider the appeal. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

Plaintiff contends that the January 30 order denying his motion to vacate is appealable under section 904.1, subdivision (a)(2) as an order entered after final judgment.⁵ In this case, however, no final judgment has been issued. The November 2014 order, of which plaintiff sought review, was not a final judgment. The court sustained the demurrer to less than all of defendant's claims and granted leave to amend as to others. As the record establishes, plaintiff has filed an amended complaint. Whether plaintiff's motion is considered a motion to vacate under section 473, subdivision (b) or a motion for reconsideration under section 1008, subdivision (a), the ruling on the motion is not an appealable order. (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 156 [motion for reconsideration].) An order denying relief under section 473, subdivision (b) is appealable only if it can be deemed " 'a special order made after final judgment,' " in which case it is appealable under section 904.1, subdivision (a)(2). (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.) That is not the case here. Accordingly, we grant defendants' motion to dismiss the appeal of the January 30 order denying plaintiff's motion to vacate.

Disposition

The motion to dismiss the appeal from the order denying plaintiff's motion to vacate is granted. Respondents' brief on the appeal from the order denying plaintiff's motion to disqualify counsel is due within 30 days of notice of this order.

⁵ Section 904.1, subdivision (a) provides in relevant part: "An appeal, other than in a limited civil case, may be taken from any of the following: [¶] (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222. [¶] (2) From an order made after a judgment made appealable by paragraph (1)."

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.